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Ombudsman Report

"Pirating Our Property"

Investigation into the City of Oshawa's Apparent Failure to Co-operate

André Marin
Ombudsman of Ontario
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Overview

1 The City of Oshawa has broken a laudable trend – a trend of co-operation and compliance that the Office of the Ombudsman of Ontario has been accorded by government authorities for more than 30 years. Displeased with the Final Report we issued in response to a closed meeting complaint, representatives of the City of Oshawa have chosen confrontation over co-operation and compliance. They have done so by holding hostage a confidential document. The City of Oshawa is refusing to return a Preliminary Report that we lent it on the clear understanding that the Preliminary Report was not to be put in City files, or reproduced, made public, or retained. Those conditions imposed by us are in keeping with our practice. We are obliged by law to protect witness information pending the release of a final report, yet we also have to give the government authority a chance to respond before we issue an adverse report or recommendation. The confidentiality protocol we were relying on in this case allows us to balance those objectives.

2 The Mayor of Oshawa, His Worship John Gray, understood the confidentiality conditions before the Preliminary Report was provided to the City. In advance of sending the Report, our investigator advised him of those terms, and he made no objection. When the document was delivered, it was under a covering letter in which I listed the strings that were attached. The Preliminary Report was accepted without protest or qualification and City officials profited from it by urging that changes be made. We agreed with some of those suggestions and modified our Final Report. Still, some City officials disliked the final product. So they pirated our Preliminary Report. They have threatened to make it public, and will not return the document. Our demands for its return have been met by shifting, convenient and discreditable claims of legal impossibility. To add insult to injury, they have taunted us to take the litigation bait to resolve the impasse instead of meeting their obligations under the *Ombudsman Act*.

3 The first claim made by the city's solicitor, Mr. David Potts, was that the City could be breaching the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*) if they were to return the Preliminary Report. When we secured an opinion from the Information and Privacy Commissioner that this was not so, Mr. Potts changed his theory. He is now making the claim that returning the document would contravene the *Municipal Act, 2001* document retention requirements, as well as the City's own document retention bylaw. Those provisions had previously been mere sidebars in the discussion, but when Oshawa's inflated *MFIPPA* bubble burst these became the arguments of refuge.

4 Oshawa's claim that these enactments prevent the return of the Preliminary Report is nothing short of absurd. It requires acceptance that *Municipal Act, 2001* retention obligations employ a broader concept of "document" than *MFIPPA* does. It requires disregarding Oshawa's own agreement to return the Preliminary Report, given when they accepted it subject to the terms we imposed. And it requires acceptance of the untenable proposition that any document handed to and read or relied upon by a City official somehow changes its ownership and control, regardless of the arrangement under which it is supplied. Yet this desperate position is now the surrogate justification being offered for the City of Oshawa's continued intransigence.

5 This shifting foundation for Oshawa's breach of our conditions is not the only factor suggesting that the legal arguments it advances are simply instrumental rationalizations for refusing to comply. At one point Mr. Potts suggested that our confidentiality conditions were ineffective because we should have advised the Mayor of the conditions before sending the Preliminary Report. When we let him know we had in fact done so, the Mayor's knowledge and acquiescence became irrelevant.

6 During our dealings with the City of Oshawa, we learned that the failure to return the document was not the only breached condition. The City also broke its agreement to keep the Preliminary Report in a file of its own so it remained the property of the Ombudsman and did not fall into City records. We discovered as well that the City made and circulated numerous copies, contrary to the clear conditions we had imposed. The City found those restrictions inconvenient, so it simply chose to ignore them. In doing so, City officials breached the implicit undertaking given by Mayor Gray when he accepted the documents knowing there were strings attached. Moreover, in blatantly disregarding the conditions because they did not like them, City officials have demonstrated either an obliviousness or rank indifference to the fact that the procedure we established for securing the confidentiality of Preliminary Reports is lawfully authorized under section 15(3) of the *Ombudsman Act*, and that there is a legal duty on governmental authorities to co-operate with my lawful requests or directions. None of this seems to matter to Oshawa.

7 When we attempted to use our authority to protect the integrity of our procedures by investigating the apparent breach by the City of Oshawa of its obligation to cooperate in our investigation, our jurisdiction to do so was questioned with half-baked arguments.

8 Given that doing nothing is no option, the City of Oshawa has now left us with two real choices. We can waste public resources and ignore our own ethos and *raison d'etre* of informal and efficient problem solving by taking up the City of Oshawa's invitation to litigate this matter in Divisional Court where the outcome would be held up for months if not years at great expense to the taxpayers, or we can follow our calling by doing what we prefer to do – namely investigating, reporting and relying on moral suasion. We have chosen to do the latter, given that I can make the necessary findings on the record that exists. I do not have to go to court to force compliance in order to present this report.

9 This, then, is my report arising from our investigation of the apparent non-co-operation by the City of Oshawa. In it, I find that the City has intentionally failed to comply with lawful demands made during the course of an investigation, and that it has obstructed this investigation.

10 The conduct that led to these findings is deeply disturbing. The Office of the Ombudsman gives tremendous value to the people of Ontario, yet we are vulnerable to this kind of thing. It would quickly become impossible for us to function if government authorities were to play lawyer's games and greet us with the kind of resistance we met in this case. This Office would become ineffective. We cannot permit that to happen.

11 What is particularly galling in this case is that the City of Oshawa chose to invite us in. Ordinarily municipalities fall outside my jurisdiction. The sole exception is for closed meeting complaints, and even then, municipalities can opt out of my jurisdiction by appointing their own investigators for these complaints. They can even set out the processes those investigators are to use. Yet, in order to profit from our cost-free service, the City of Oshawa had elected to attorn to our jurisdiction and accepted that the Ombudsman of Ontario would be its open-meeting watchdog. Now it is acting as though it wants a watchdog without teeth, one that gums his way around ineffectively and who can be ignored. The City cannot have it both ways. It cannot agree to give me authority to come in, but then choose to disregard the powers and procedures the Legislature gave my Office. If the City of Oshawa wants a toothless watchdog for its citizens, it should create one by bylaw. I have too much respect for this Office to stand by and watch the City invite us in, only to disrespect our essential procedures. It is to the discredit of some of its officials that this has happened.

The Investigation

12 This was an "own motion" investigation, conducted under the authority of section 14(2) of the *Ombudsman Act*. It arose out of events surrounding a "closed meeting" investigation conducted by my Office as a result of a complaint filed on June 11, 2008, alleging that the Development Services Committee of the City of Oshawa had improperly held a closed "special meeting" on May 22, 2008, which should have been held in open session. The investigation was conducted and, in keeping with our practice, a Preliminary Report was furnished to the City of Oshawa. It was furnished confidentially, on conditions that it was to be kept in its own file, that it not be copied or marked, and that it was to be returned. This investigation is into whether the City of Oshawa has contravened its obligations to co-operate with the Ombudsman in the way it dealt with that Preliminary Report. As for the closed meeting complaint, my Final Report on that investigation was issued to the City on March 24, 2009. Under the *Municipal Act, 2001*, the City is required to make that report public.

Ombudsman Jurisdiction

13 The Office of the Ombudsman has jurisdiction to investigate the apparent failure of governmental organizations or agents to co-operate in its investigations. In doing so, the Office of the Ombudsman is not acting inappropriately as a judge in its own cause. An Ombudsman is not a judge. As Ombudsman I can *impose* no sanctions. I report what I find so that others can take appropriate action, if persuaded to do so. To accept that I cannot identify, confirm and report non-co-operation that occurs during my investigations would require the Ombudsman to refer all allegations of non-co-operation to the police for potential prosecution under section 27 of the *Ombudsman Act*. This would result in needless escalation and defeat the informal, problem-solving ethos of the *Ombudsman Act*. To hold that I cannot investigate apparent non-co-operation during my investigations would be an absurd interpretation of the statute. I am therefore confident that the fact that the subject of an investigation affects the way others deal with my office does not denude me of jurisdiction.

14 This particular investigation is an "own motion" investigation. I did not receive an external complaint that the City of Oshawa did not co-operate in the closed meeting investigation that we conducted. I have undertaken this investigation on my own initiative. Again, it would be absurd to expect that I could protect my processes

only where others complain. I have a responsibility to ensure that my investigations are effective and that the authority of this Office is respected. If I learn of apparent non-co-operation in my investigations, I am obliged to look into it and to make an appropriate report if that apparent non-co-operation proves to have occurred.

15 Section 14(2) of the *Ombudsman Act* grounds this jurisdiction. It gives me the authority to conduct "own motion" investigations into any "act done or omitted in the course of the administration of a governmental organization and affecting any person or body of persons in his, her or its personal capacity." Ordinarily municipalities fall outside the jurisdiction of the *Ombudsman Act* and are exempt from this authority. Exceptionally, as a result of amendments to the *Municipal Act, 2001* and the *Ombudsman Act*, some municipalities fall within the jurisdiction of the *Ombudsman Act* for the investigation of complaints about closed meetings. The City of Oshawa does because it chose not to appoint its own investigator for such complaints.

16 The remaining question under section 14 is whether a failure to co-operate in an Ombudsman investigation is an act or omission "affecting any person or body of persons in his, her or its personal capacity." Of course it is. The failure to co-operate will compromise investigations, thereby affecting the personal interests of those who made the original complaint. In the case of closed meeting complaints, a failure to co-operate affects the body of persons that is the public, who are entitled to expect that the Ombudsman's jurisdiction to investigate closed meeting allegations will be effective. In this case the alleged non-co-operation relates to the failure by City of Oshawa officials to respect conditions attached to the handling of a Preliminary Report. Those conditions are imposed to protect the statutory right to confidentiality of witnesses and informants. The failure to co-operate in securing the confidentiality of Preliminary Reports affects their personal interests. Indeed, an unaddressed failure to respect confidentiality requirements threatens the personal confidentiality interests of all complainants in all Ombudsman investigations for the precedent it sets. Section 14(2) of the *Ombudsman Act* gives jurisdiction for this investigation.

17 Alternatively, I have the authority to make findings about non-co-operation within the context of complaint-based investigations. The fact that the Final Report on the closed meeting case was sent to the City before this investigation was undertaken does not prevent me from now addressing the apparent non-co-operation of the City of Oshawa during that investigation. If the release of a final report in an investigation in which an apparent failure to co-operate occurred was to deprive me of jurisdiction to investigate that non-co-operation, final reports would have to be

delayed until non-co-operation investigations were completed. This makes no sense.

18 In any event, my equitable jurisdiction permits me to reopen my investigations. The apparent failure of Oshawa to return the Preliminary Report was not discovered until the Final Report in the closed meeting investigation was forwarded to the City of Oshawa. We were remiss in not noticing this. Evidently, we should not have traded on the luxury of our positive experience with the Government of Ontario and other municipalities and taken compliance for granted. But what matters is substance, not timing. If I had to do so in order to ground my authority to investigate, I would choose to invoke my equitable jurisdiction to reopen the original investigation, for it is in the public interest to address the substance of what happened in preference to disclaiming jurisdiction formalistically because the apparent breach of a confidentiality measure was not discovered until after the Final Report was issued to the City.

19 Without question, I have the jurisdiction to undertake this investigation, and I feel I had no choice but to do so.

Investigative Process

20 On June 11, 2008, our Office received a complaint alleging that the Development Services Committee of the City of Oshawa had improperly held a closed meeting on May 22, 2008. We learned during the course of that investigation that the City of Oshawa had not returned our Preliminary Report. Officials within my Office demanded its return. When the City refused, I decided to investigate whether this refusal amounted to non-co-operation in our closed meeting investigation. On March 31, 2009, out of an abundance of caution and to ensure fair notice, I wrote to Mayor Gray, advising him of my intention to investigate the apparent failure of the Corporation of the City of Oshawa to abide by the conditions under which the copy of my Preliminary Report was provided. That same day, Mr. Gareth Jones, Director of the Special Ombudsman Response Team, wrote to Mayor Gray requiring documentation and advising him that Mr. Ciaran Buggle of our Office had been appointed lead investigator. The investigative process that followed is inextricably intertwined with the overall narrative that follows. I will therefore say no more about it here.

Investigative Findings

Relevant statutory background

21 Under the *Ombudsman Act*, we are obliged to treat as privileged all information received during an investigation. Specifically, Subsection 24(3) says:

> (3) Anything said or any information supplied or any document or thing produced by any person in the course of any inquiry by or proceedings before the Ombudsman under this Act is privileged in the same manner as if the inquiry or proceedings were in a court.

22 This means that we are statutorily obliged to hold confidential what we learn during our investigations. The reason is obvious. Our effectiveness in resolving complaints depends on the candid receipt of information. Many of our informants and witnesses are government insiders who must furnish unflattering information about their superiors and institutions. The law must therefore give as much comfort as possible to those who supply information that they will be protected from reprisal.

23 While under subsection 12(1) I am required to swear an oath not to disclose information received as Ombudsman, at the same time, I am statutorily obliged to report my findings so that any problems that have been identified can be rectified. Subsection 12(2) therefore provides:

> (2) The Ombudsman may disclose in any report made by him or her under this Act such matters as in the Ombudsman's opinion ought to be disclosed in order to establish grounds for his or her conclusions or recommendations.

24 In effect, the statutory promise of confidentiality to informants and witnesses is subject to the principle that permits disclosure, in a non-confidential report, of information that is necessary to explain or support the positions we ultimately take. In other words, the confidentiality obligation is subject only to what is contained in a Final Report issued under the authority of either section 21 or subsection 14(2.5) of the *Ombudsman Act*.

25 Meanwhile, it is important that the Ombudsman be as accurate as possible in the findings that are made. It is therefore prudent for me to give the affected governmental organization an opportunity to see what I have made of the evidence. This is done in the interests of the institution, as this process can result in any errors

we may have made being identified and removed, and it allows for explanations to be inserted. It is a process that can save the responding governmental organization needless embarrassment. Indeed, where it appears that there may be sufficient grounds for me to make a report or recommendation that may adversely affect any governmental organization or person, I am obliged by subsection 18(3) to give that governmental organization or person an opportunity to make representations. The only way to give affected institutions and individuals a meaningful opportunity to respond is to share a preliminary version of the report with such persons in advance of its finalization.

26 How, then, can the confidentiality obligation and these consultation and representation mandates be accommodated? We in the Office of the Ombudsman follow a practice adopted by other Officers of the Legislature who face the same dilemma. We prepare Preliminary Reports and we release them on conditions designed to secure their confidentiality to the maximum degree possible. This practice is grounded statutorily in subsection 15(3), which authorizes me to determine my own procedures. Not only is my authority to impose confidentiality conditions supported by law, it is an authority I must jealously guard. If I could not follow this practice, my ability to balance the important competing interests I am charged with under the Act would be undermined. It is with this background in mind that the events leading to this report should be understood.

The Tug-of-War for our Preliminary Report

27 By February 2, 2009, I had concluded my investigation into the complaint of June 11, 2008. We were ready to send out our Preliminary Report to secure the feedback of the City of Oshawa and to allow it to respond, in the event it considered any of our findings or recommendations to reflect adversely on the municipality.

28 Before the Preliminary Report was forwarded, Ms. Domonie Pierre, the investigator assigned to the file, contacted Mayor Gray. She reviewed with him our standard conditions for securing the confidentiality of the Preliminary Report. She explained that the Preliminary Report that we were about to send him would remain the property of the Ombudsman, that it was not to be copied or marked, and she told him it should be held by the City of Oshawa in a separate file, and was not to be kept but was to be returned to us. Mayor Gray confirmed that he understood. At no time did he raise objection to any of those conditions or hint that the City would not or could not comply.

29 The Preliminary Report was then sent by courier. Each page was marked "Confidential – Property of the Ombudsman / Not to be Marked or Copied." It was put under cover letter signed by the Ombudsman. The letter stated:

> The purpose of providing you with this Preliminary Report is to allow you to provide me with any comments, which you would like to be taken into consideration, before the Final Report is issued. The Preliminary Report is not a final document, and is not made available to the public for this reason.
>
> In order to preserve the integrity of the process, and to avoid disclosure of information before you have had an opportunity to respond, I have instituted measures to preserve the confidential nature of the Preliminary Report. Accordingly, I would ask that you:
>
> - Maintain the enclosed Preliminary Report in a separate file to ensure that it is considered to be still in my custody and does not form part of your records. This document is not to be marked or copied.
> - Return the Preliminary Report by February 16, 2009.
> - Refrain from publicly commenting on the Preliminary Report or announcing any steps that deal with its findings or recommendations.

30 At no time did anyone from the City of Oshawa contact us to communicate that the conditions were unacceptable or unclear. Instead, the delivery of the Preliminary Report was accepted.

31 This Preliminary Report was put to the use by the City of Oshawa that it was intended to serve. On February 12, 2009 we received a call from the City Solicitor, Mr. Potts, who said that staff had raised concerns about inaccuracies in the draft report. He asked our in house counsel, Ms. Laura Pettigrew, for the notes of our interviews and for transcripts. She explained that the investigations are conducted in private and we cannot release the identity of the witnesses in order to ensure the integrity of our investigations. Mr. Potts said that he understood this and had anticipated that response. Ms. Pettigrew advised Mr. Potts to detail any perceived errors in the City's response. Given that the deadline described in my letter, February 16, 2009, proved to be the Family Day holiday, Ms. Pettigrew confirmed that the City had a one-day extension.

32 On February 17, 2009, the last day of the new deadline, the Mayor took the opportunity given to the City of Oshawa and furnished a three-page response to the Preliminary Report. The letter itself was polite and tempered. We considered the letter, and where its observations and recommendations could be accommodated without undermining the integrity of the investigation, they were. The Preliminary Report was edited and on March 24, 2009, the Final Report was sent to the City for release. Unfortunately, no one from our Office had noted that the copy of the Preliminary Report that had been lent to the City had not been returned to us. Unaware of this, I included a covering letter with the Final Report thanking the City of Oshawa for its co-operation during the investigation.

33 As is our practice, I outlined in the Final Report the objections taken to the Preliminary Report, and addressed them on their merits. We do this to ensure that any objections to the contents of the Final Report are recorded, and to explain to the relevant governmental authority why we have not accepted those objections or comments that we ultimately reject. It is this section of the Final Report, "Response of the Council of the City of Oshawa," that upset Mayor Gray. A note from Ms. Pettigrew dated March 26, 2009 alerted me as follows:

> I heard back today from John Gray, the Mayor for the City of Oshawa concerning our closed meeting report.
>
> He began by saying he was upset with the tone of the final report because in the section on the Response of the Council of the City of Oshawa the "Mayor" was repeatedly referred to. He mentioned that he was not even at the meeting. I noted that the reason he was referred to in that section was that he had responded on behalf of Council to the preliminary report and his comments were accordingly referenced in the response section. [The report is clear that he was not in attendance at the meeting.]

34 Ms. Pettigrew said she "took the opportunity to address a couple of the points raised in [Mayor Gray's] February 17, 2009 response.

35 It was shortly after this conversation that we learned that that the City of Oshawa had not returned the Preliminary Report. This became clear in a conversation with City Solicitor Potts, who phoned Ms. Pettigrew on the heels of her conversation with Mayor Gray. According to Ms. Pettigrew's contemporaneous memorandum of the phone call:

> [Mr. Potts] explained that it is likely that the City will issue the Mayor's letter of response with our [Final] Report. He said under the circumstances an issue was raised about releasing the preliminary report.

36 At the suggestion that the Preliminary Report was still being held by Oshawa and could be released, Ms. Pettigrew responded by reminding Mr. Potts of the conditions that were attached to the Preliminary Report. Mr. Potts was not moved. He gave two responses. The first was legalistic. As recorded in Ms. Pettigrew's notes:

> He suggested that the Information and Privacy Commissioner might take the view that it was a City record under *MFIPPA* (The *Municipal Freedom of Information and Protection of Privacy Act*) and required to be retained.

37 I will address the *MFIPPA* point in detail below.

38 The second response by Mr. Potts was a plea for clarity:

> He said that the City wanted to put everything in context. He mentioned, for instance, that [in the Final Report] we had said the Mayor asked for recommendations [1a and 1b] to be deleted, when he had said they were unclear.

39 The example Mr. Potts gave was correct. We had deduced from his objection to the recommendations that Mayor Gray wanted them deleted, and we had presented that deduction as though Mayor Gray asked directly for this to happen.[1] We do regret the imprecision. Still, there would have been no need to release the Preliminary Report in order to avoid potential misunderstandings. Mayor Gray's position could have been clarified simply by releasing his response and contrasting that with what the Final Report said. Indeed, this is what Mr. Potts proposed to do in his phone call with Ms. Pettigrew, and we said that we would have no problem with that.

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[1] The relevant recommendations were retained in the Final Report as 1(a) and 1(b). They advise that "The City of Oshawa should ensure that in future no subject is discussed in a closed education or training session unless (a) It is clear that the presentation of the discussion is only for the purpose of education or training, and (b) All material prepared by presenters and trainers is vetted in advance to ensure it contains only educational or training information and presenters and trainers are instructed that they can only present or discuss information for the purpose of education or training." Mayor Gray's response contended: "With respect, neither the *Municipal Act* nor the City's Procedural By-law limit in any way the number of topics that could potentially form the subject of an education session. Accordingly, recommendations 1(a) and 1(b) are similarly unclear."

40 On March 30, 2009, Ms. Pettigrew sent Mr. Potts a letter by fax. It was a formal demand letter requiring the return of the Preliminary Report within 24 hours. The letter was not a curt assertion of authority. It contained a detailed explanation of why the Ombudsman provides preliminary reports on a strictly temporary and confidential basis, and it reprised the terms and conditions that were attached to the delivery of the Preliminary Report in this case, conditions we had every reason to believe had been accepted by the City. It also reaffirmed that Mayor Gray was free to release his own response letter if he chose and to comment on the Final Report as he saw fit. The letter left no doubt, however, that the Ombudsman was insistent that under no circumstances was the Preliminary Report to be released to the public or retained. In it, Ms. Pettigrew said:

> During our conversation, you referred to the principles of openness and transparency as potential justifications for releasing the Preliminary Report. As noted, the Preliminary Report is the property of the Ombudsman's Office and should not be considered City property. Such a position, if taken by the City would be inconsistent with the provisions of the *Ombudsman Act* and would undermine the jurisdiction of this Office and hinder its ability to conduct its work as an independent oversight body.

41 She confirmed that Mayor Gray was free to release his own response letter and to comment on the Final Report as he saw fit. She recounted the conditions under which the Preliminary Report had been sent and gave a full explanation that preliminary reports are shared "in order to enable us to effectively conduct our work as an independent oversight body." She offered to have someone from our Office pick up the Preliminary Report.

42 At 4:18 p.m. that day, Mr. Potts left a message on Ms. Pettigrew's voicemail. He said, in material part:

> I'm in the Court of Appeal tomorrow and potentially the day after, so I see this 24-hour period referenced in your letter. Of course, I'm not personally in a position to comply because there are various copies of this letter that have been distributed for the purpose of preparing the response. The Mayor … I received a copy from the Mayor's office so I have my own copy.
>
> But just to clarify something that's not mentioned in your letter and which I'll respond to, is that the reason that I called you was in contemplation of

> the possibility that a third party may compel the City to make a decision in its capacity as "head" under the *Municipal Freedom of Information and Protection of Privacy Act*, which requires us to consider what is a record, and whether we have custody of a record and, you know, as I said during our conversation, I'm just thinking about this issue, proactively.
>
> It may in fact not be something that the Ombudsman's office has thought about before or thought about at the moment of actually delivering the report to the City, which is, I agree with your letter, is what has happened. It may be that the Ombudsman's office can't compel us not to comply with *MFIPPA*, but that is the issue that I'm considering, 'cause I do know that, as I said during our conversation, one's reference to the final report is going to raise questions about the Mayor's response which is referred to in it. The Mayor's response in turn is going to perhaps create interest in the Preliminary Report, whether we want to release it or not.

43 This phone message was followed by a 5 p.m. email in which Mr. Potts said:

> As discussed [presumably in the voicemail message], I contacted you in contemplation of a potential question respecting the City's obligations, if any, to disclose the Ombudsman's report if/when a request for records may be submitted by a third party pursuant to the *Municipal Freedom of Information and Protection of Property Act* (*MFIPPA*).
>
> The final report refers to the Mayor's comments which, in turn, refer to the preliminary draft so its plausible that a request will be forthcoming and that the municipality will be required to determine its *MFIPPA* obligations as they may or may not apply to the preliminary report. The City must, therefore, first determine whether the preliminary report is a "record" to which *MFIPPA* and the City's record retention by-law apply. That determination may impact on the City's legal ability to comply with the Ombudsman's request where, as noted in your letter, the preliminary report was provided to the city by the Ombudsman's office.
>
> Your letter's reference to the principles of openness and transparency reflect the concern that a correct answer is also important with respect to the City's transparency obligations under *MFIPPA*.

44 Mr. Potts said he was forwarding the email to the City Clerk "so that we'll be in a position to discuss the request in a timely fashion [after his return from court]." He

asked Ms. Pettigrew for any authorities "to support one view or another" to assist him in giving an opinion to staff.

45 Shortly after the email was received, Ms. Pettigrew spoke directly to Mr. Potts. His comments, as described in the contemporaneous notes of Ms. Pettigrew, were not heartening. At first he agreed that there were other copies but when asked how many copies he said that he only knew for sure that he had one. He said that our non-copying condition made things difficult, as though this somehow justified disregarding the conditions on which the Preliminary Report was furnished. When Ms. Pettigrew insisted that all copies of the Preliminary Report be furnished to us within 24 hours, he protested that the City had already contravened the open meeting provisions and was concerned it could be contravening *MFIPPA* by complying. Yet he did not seem concerned that the City might be violating the *Ombudsman Act* by initially copying and now retaining the documents.

46 When Ms. Pettigrew attempted to persuade him to return the documents by explaining how important it was for us to create an environment that would permit complainants and witnesses to speak bluntly, he took what can fairly be described as a shot. He said he appreciated this, and likened it to "councillors letting their hair down in an education and training meeting." That was an allusion to our Final Report where I concluded that it was inconsistent with the education and training exemption of the *Municipal Act, 2001* open meetings provisions for a councillor to seek to justify the closing of doors in order to give "councillors an opportunity without raising public expectations to 'let their hair down … and talk about issues without looking over their shoulder and wondering what will appear in the press the next day." It struck me that Mr. Potts betrayed with that comment an apparent underlying hostility to our closed meeting report. He then signalled where his opinion was likely to lie. He said that the fact that we acknowledged the document was provided to the City likely rendered it a City "record."

47 It was at this juncture that I decided to launch an investigation into "the apparent failure of the Corporation of the City of Oshawa to abide by the conditions under which a copy of my Preliminary Report into the Development Services Committee Special Meeting of May 22, 2008 was provided …" I did not do so lightly. Three things influenced my decision:

- Altogether apart from issues relating to the return of the Preliminary Report, it now appeared that the Preliminary Report had been copied and circulated, notwithstanding that it was conspicuously marked "Confidential – Property of The Ombudsman / Not to be Marked or Copied" and that the mere inconvenience of the condition may have been the reason for its disregard;

- It was apparent that responsible officials in the City of Oshawa did not consider themselves bound by the confidentiality conditions they were aware of when accepting the Preliminary Report. They were evidently choosing to disregard our unequivocal demands for the immediate return of our Preliminary Report and its copies on the basis of mere musings about potential *MFIPPA* applications, arguments about "openness and transparency," and the possibility that the City could ultimately advance the "opinion" that we had no legal right to a return of our Preliminary Report; and

- It was apparent that officials within the City of Oshawa were considering the release of the Preliminary Report in order to enable the Mayor to explain the positions he took in response to the Preliminary Report.

48 All of this was happening in an atmosphere of apparent disquiet over the tone and content of our Final Report. Simply put, I was concerned that the decision to withhold and potentially release the Preliminary Report was now being considered by officials who were displeased with our Office and who had demonstrated an apparent disinterest in our confidentiality conditions. Moreover, it appeared that the decision to refuse to return the Preliminary Report could potentially be politically motivated or inspired by a sense of unfairness. This alerted me to the prospect that the tentative arguments being offered for not complying could well be nothing more than mere rationalizations. Certainly on their merits they seemed so.

49 To underscore the importance that we attach to the confidentiality conditions, I reminded the Mayor in the investigation letter that: "Such conduct may constitute an offence under s.27 of the *Ombudsman Act*." Although the City Solicitor was later to disclose in an April 2, 2009 voicemail message his misunderstanding that the letter was alleging that I "was going to be proceeding with charges," the letter did not say that. It did not even say I was investigating an offence under section 27. That is for police officers to do in the event of a criminal complaint. I was simply pointing out the seriousness of this matter.

50 I sent the notice on March 31, 2009. The next day, on April 1, 2009, Mr. Potts sent an email to Ms. Pettigrew setting out eight questions. He said that "the email was sent in a good faith attempt to better understand the Ombudsman's position respecting the City's obligations including under *MFIPPA*," and he wanted responses so as to be able to properly advise Oshawa council and staff. Only question 7 and 8 were about *MFIPPA*. The first six questions related to possible challenges to the Ombudsman's jurisdiction to conduct its investigation that Mr. Potts was evidently mooting.

51 On April 1, Ms. Pettigrew responded only to the *MFIPPA* issue as follows, while reasserting our demand for the return of the copies:

> Further to your email of earlier today, I understand that Mayor Gray confirmed with the Ombudsman's investigator this morning that numerous copies of the Preliminary Report were made in direct contravention of the Ombudsman's direction in his Feb. 2, 2009 letter. I am again reiterating our demand that the Preliminary Report and all copies be returned to the Ombudsman's Office forthwith. It has been made clear to you and to Mayor Gray that the Preliminary Report is property of the Office of the Ombudsman. Any copies that were made by the City were unauthorized and should be considered property of the Office of the Ombudsman as well and immediately returned. I understand that the City of Oshawa has not received any requests under *MFIPPA* to date for copies of the Preliminary Report. In light of this and this Office's position that the Preliminary Report and unauthorized copies remain property of the Ombudsman's Office, discussion of the application of *MFIPPA* is unnecessary and irrelevant at this time.

52 The next day, April 2, 2009, Mr. Potts left a phone message, protesting that we had not answered the questions relating to our jurisdiction to conduct the investigation. He said:

> As I read the Act, the Ombudsman is without jurisdiction to undertake his own investigation, particularly with respect to a matter for which he's alleging he is going to be proceeding with charges.

53 He expressed his opinion that the Office of the Ombudsman was establishing "a very significant paper trail of bullying" and wondered who was watching the watchdog. He again asked for answers to his questions.

54 Ms. Pettigrew emailed Mr. Potts in response. She said:

> With respect to your question regarding the Ombudsman's authority to undertake the current investigation, while the substance of the investigation into the closed meeting complaints has concluded, the Ombudsman's process has not concluded as the City's compliance with the conditions for dealing with the preliminary report is still outstanding.

55 She cited the Ombudsman's equitable authority and left no ambiguity when she said, "Our office maintains that it has the authority to investigate whether a breach of the Ombudsman's procedural conditions has occurred."

56 Within minutes Mr. Potts called, and he and Ms. Pettigrew had a conversation. He began by purporting to answer the jurisdictional questions he had asked us to answer. He said that we had sent our Final Report and questioned our authority to launch a new investigation, asking "who is the person personally affected in their capacity to satisfy s.14(1) of the Act?" He said he sent the questions because he cannot see that the jurisdictional issues have been satisfied. He said that there was a process to resolve them – a reference to Divisional Court – and he suggested that we could resolve the *MFIPPA* issues by seeking out the view of the Information and Privacy Commissioner, a point he later returned to in the conversation by inviting us to consult together with the Information and Privacy Commissioner's Office.

57 He then changed his position on the application of *MFIPPA*. It was no longer a case of wondering whether the Preliminary Report was a document the City was compelled to retain. He said he was "confident in his opinion that as a result of the retention provisions in *MFIPPA* and the City's own Records Retention By-Law, the preliminary report is within the custody and control of the City and cannot be returned as requested." He said he believed our position "is wrong in law" and that we were under "a misapprehension that the City did not have custody or control of the document." He said the City of Oshawa was compelled to retain it.

58 Apparently unaware that Ms. Pierre of our Office had rehearsed our confidentiality conditions with Mayor Gray before releasing the Preliminary Report to the City, Mr. Potts said we should have confirmed the conditions for sending the document before it was sent. It is evident that this would have made no difference to Mr. Potts. When we advised him we had done so, he persisted that the City was under an obligation not to return the documents, and that to do so would contravene *MFIPPA*.

59 The discussion ended at loggerheads. Ms. Pettigrew told him the answer was quite simple. The Preliminary Report was ours and had been given conditionally to the City. He said that he had told staff that the issue of our jurisdiction was unclear, and that while they had to comply with the closed meeting investigation, the jurisdiction in this case was at issue.

60 That conversation was not only about the retention. Mr. Potts took the occasion to mention that the City still disagreed with a couple of points in our Final Report, such as with respect to the scope of the "education and training" exemption.

61 At 7:54 p.m., Mr. Potts emailed again, and laid out a number of points that he said were intended to encourage resolution:

1. As noted in earlier communications, it is the City's view that the Ombudsman's preliminary report is a record in the City's custody or control. A copy of it was delivered by the Ombudsman to the City for the purpose of preparing a response. The Ombudsman subsequently received, apparently considered and ultimately referenced the City's response in his final report. Clearly it was intended that that City act on the preliminary report and it did so pursuant to the Ombudsman's request after receiving from the Ombudsman the preliminary report.

2. The City is obliged to retain records in its custody or control. The Ombudsman's direction to return it (and any copies) is contrary to the City's obligations respecting records in its custody and control.

3. Whether the preliminary report is a record in the City's control or power is related to the Ombudsman's jurisdiction to investigate. The issue should, therefore, be settled or determined without delay.

4. If you and I are unable to resolve this preliminary legal issue, I've suggested that we invite our legal colleagues in the Office of the Information and Privacy Commissioner/Ontario (or other mutually acceptable access/privacy experts) to consult with us.

5. If the issue remains unresolved, it should be referred to the Divisional Court pursuant to section 14(5) of the Act (along with any remaining unresolved and relevant issues respecting jurisdiction including those detailed in the writer's email of Apr. 01/09 and in your email below).

6. The Ombudsman's investigators should be immediately requested to "stand down" pending the resolution of this issue. I appreciate your undertaking to respond to this request at the earliest opportunity and look forward to your confirmation.

7. The Ombudsman may be reassured that the City is treating the preliminary report as a record exempt from disclosure pursuant to paragraph 9(1)(d) of

the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA") and will continue to do so unless and until the issue is determined differently by the Information and Privacy Commissioner/ Ontario in the context of a complaint or until the City reaches a different legal conclusion (with reasonable notice to the Ombudsman).

8. On the assumption that we may agree that the preliminary report is, in the circumstances, a record in the City's custody or control, we should presently turn our minds to the applicability of paragraph 9(1)(d) of *MFIPPA* so that we'll be in a position to respond if/when a request for records is submitted. For that purpose I'd appreciate if you'd respond to question 8 in the Apr 1/09 email. [Question 8 had asked, "Is the Ombudsman's position that his office is an agency of the Government of Ontario?"]

62 The next day, April 3, 2009, I agreed to hold the non-co-operation investigation in abeyance. I then instructed my Deputy Ombudsman and Director of Operations, Ms. Barbara Finlay, to secure an opinion from the Office of the Information and Privacy Commissioner of Ontario on the issue of whether the *Municipal Freedom of Information and Privacy Act* requires municipalities to retain a copy of a draft Ombudsman's report. Ms. Finlay wrote to the Assistant Commissioner (Access), Mr. Brian Beamish, setting out our practice and its rationale and asking for an opinion. Six days later, on April 9, 2009, Mr. Beamish sent us a response. His opinion was unambiguous:

> … I am satisfied that the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) does not impose an explicit legal obligation that an institution retain a copy of a draft provided to the institution by the Office of the Ombudsman. In the circumstances you describe, there is nothing in the *Act* which would prevent a municipality from returning the copy of the draft report to the Ombudsman, or that would prevent a municipality from fulfilling the conditions imposed by your office.

63 Believing that the technical impediment to return was out of the way, Ms. Finlay immediately prepared a letter to Mr. Potts. Citing the opinion that there is no legal justification for the City continuing to refuse to comply with the Ombudsman's direction, she asked Mr. Potts to ensure that all copies would be returned to us by 4:30 p.m. that day. She offered to recommend that the non-co-operation investigation be discontinued if this was achieved, and cautioned that if the City

refused to comply, the Ombudsman would have no option but to resume its investigation forthwith.

64 Mr. Potts' reaction was not to accede. Instead he emailed the Assistant Commissioner, Mr. Beamish, copying Ms. Pettigrew, complaining that he had not had an opportunity to participate in the communications with the Information and Privacy Commissioner's office. He then attempted to read the opinion narrowly, being "scoped to *MFIPPA*" while not addressing the City's own Records Retention By-law passed under the *Municipal Act, 2001*.

65 He emailed Mr. Beamish again two hours later after we furnished Ms. Finlay's letter requesting the opinion. In the course of the email, Mr. Potts explained why the City disregarded the Ombudsman's "no copy" condition:

> "A few copies of the report were made and circulated to those City staff or Councillors whose input was relevant to the Ombudsman's request for comments. The conditions to maintain a separate file and to not make copies were inconsistent with the purpose for which the draft was delivered by the City. Accordingly those conditions were disregarded."

66 That is an important admission that I will return to in a moment. Of more immediate importance was the following passage in the email:

> We note that Ms. Finlay's inquiry was, in fact scoped to "whether there is any requirement under the *Municipal Freedom of Information and Privacy Act* ..." Your letter responds to that question. **However, as noted below, that does not appear to be the issue between the parties**. [Emphasis added by me]

67 He then attempted to make a case for the retention obligation under the *Municipal Act, 2001* and the City's Records Retention By-law, saying:

> The City has only engaged the Ombudsman's office in a discussion about *MFIPPA* to the extent that a third party may, at some point, submit an access request. .... Again, the City's intention throughout has been to comply with all of its obligations including its immediate obligation to retain the subject record pursuant to the *Municipal Act, 2001* and its Records Retention By-law.

68 Mr. Potts therefore said that, "in the circumstances, we will proceed on the assumption that your response to Ms. Finlay was not intended to suggest that the

City is compelled to return all copies of the draft report and your response was not intended to address the City's obligations pursuant to the *Municipal Act, 2001* or its Records Retention By-law."

69 Given what had transpired, I felt I had no choice but to reopen the investigation. It was evident there was no persuading Mr. Potts. Ms. Pettigrew advised Mr. Potts of this on April 13, 2009 by email. She advised Mr. Potts that we would be in contact with City officials to begin interviews and said we expected full co-operation.

70 What we received in return was an email from Mr. Potts of April 14, 2009, asserting:

> *The Ombudsman is without jurisdiction to continue to commence an investigation respecting the City's obligation to retain the Ombudsman's draft report.* [Italics in the original]

Why I Chose to Wrap up the Investigation

71 The denial by the City of Oshawa of our jurisdiction to investigate their apparent refusal to abide by the conditions under which a copy of my Preliminary Report in the closed meeting case was furnished has prevented us from completing the non-compliance investigation in the ordinary course. Specifically, we have been unable to interview City officials or to secure copies of relevant documents. The City's refusal to recognize our jurisdiction left us with five hypothetical choices, but only two real options. It is evident from this report that I have chosen the option of wrapping up the investigation and reporting, what I describe below as the fifth of the possible options. Here is why I made that choice:

72 The first hypothetical option I had was simply to give up. My responsibilities under the *Ombudsman Act* and to the institution prevent me from doing so. Our Preliminary Report protocol is essential to the proper balancing of the competing statutory interests we are required to broker. We cannot operate effectively or even lawfully without assuring confidentiality before the release of a Final Report, yet we cannot ensure an accurate product or comply with our obligations under section 18(3) without sharing our preliminary conclusions. Our Preliminary Report protocol, under challenge in this case, is too important to abandon. More generally, the Office of the Ombudsman depends ultimately on the co-operation of governmental authorities that fall within its jurisdiction. Our work could be brought to a standstill were we to ignore apparent cases of non-cooperation. The

work we do is simply too important and too valuable to the citizens of this Province to permit that to happen.

73 The second hypothetical option would have been to take up the invitation of the City of Oshawa and invite the Office of the Information and Privacy Commissioner to try to broker a settlement. That invitation was made by Mr. Potts on more than one occasion, including in his second April 9, 2009 email to Mr. Beamish, the Assistant Commissioner. As Ms. Pettigrew explained to Mr. Potts, however, it would be inappropriate for me to negotiate my mandate with any governmental authority under investigation, regardless of who brokers that negotiation. I have the lawful authority and responsibility under section 15(3) of the *Ombudsman Act* to determine my own processes, and I have done so in the case of Preliminary Reports in a way I consider to be essential to our ability to fulfill our mandate. It would be an abdication of responsibility to trade that authority away or compromise it in any way.

74 Moreover, even if compromise was on the radar screen, it would be inappropriate for me to invite the Office of the Information and Privacy Commissioner to determine that compromise. I have every respect for the Information and Privacy Commissioner. She is a fellow Officer of the Legislature. Her staff is professional and capable. Yet we are both independent Officers of the Legislature and it would diminish the authority of this Office for me to give authority to another Officer of the Legislature to settle this matter. Moreover, it would put officials in the Information and Privacy Commissioner in an embarrassing position, even to ask them to mediate.[2] This is not, and never was, a real option.

75 The third hypothetical option would have been to lay a complaint with a police authority that could conduct an investigation and determine whether to charge officials within the City of Oshawa. Criminal charges are to be laid as a last resort. The prosecutorial route should be avoided unless absolutely necessary. My obligation as an Ombudsman is to attempt to provide an effective, informal resolution. Of course, the mere existence of section 27 contemplates that there will be cases where charges should be laid. This is not, in my judgment, a case where charges should be pursued without attempting the lower-level resolution of exposing the City's intransigence to the sanitizing light of day.

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[2] Calling on the Information and Privacy Commissioner to mediate or adjudicate is different, of course, from our decision to secure that Office's opinion on whether Preliminary Reports fall within MFIPPA. Had the Information and Privacy Commissioner believed they did, that would have to be resolved, probably through legislation.

76 The fourth option I had was to accept the invitation of the City of Oshawa and apply to the Divisional Court under subsection 14(5) for a ruling on my jurisdiction. That section provides:

> (5) If any question arises whether the Ombudsman has jurisdiction to investigate any case or class of cases under this Act, the Ombudsman may, if he or she thinks fit, apply to the Divisional Court for a declaratory order determining the question.

77 This provision authorizes me to apply to the courts in cases where jurisdictional questions arise. It does not require me to do so. I see no merit in suspending an investigation and running off to Divisional Court to confirm a jurisdiction I know to be clear. Litigation is expensive and time-consuming. My Office was created in large measure in an effort to diminish resort to litigation. It is inconsistent with the ethos of this Office to readily agree to join issue before a court, simply because a governmental authority denies my jurisdiction. Third, there is no need to resolve the jurisdictional issue judicially. Given the nature and progress of our investigation, I do not require further co-operation from the Corporation of the City of Oshawa or its agents to make relevant, fair and accurate findings. The record of our dealings with the City and its solicitor makes clear what has transpired. The only thing that is missing is matters of detail, and the opportunity for the City of Oshawa to respond. The matters of detail would have been nice, but are not required in order for me to describe what has transpired. The City of Oshawa was afforded the opportunity to respond to this report. I have, of course, become wiser as a result of what has occurred. They were given the opportunity to attend the Office of the Ombudsman to view the preliminary version of this report on the condition that responsible officials signed a formal undertaking to abide by confidentiality conditions. The Mayor declined, but sent a letter that he asked to have appended to this report – which we have done.

78 My final option, then, was to wrap up the investigation and issue this report.

Analysis of Investigative Findings

79 The City of Oshawa has breached its obligation to co-operate with my Office. It has done so by failing to abide by the conditions under which a copy of my Preliminary Report into the Development Services Committee meeting of May 22, 2008 was provided, and it has done so by refusing to co-operate with this investigation into that apparent failure.

The Preliminary Report Breaches

80 The City of Oshawa has failed to co-operate by breaching the conditions attached when the Preliminary Report was provided. Indeed, it failed to comply with three of the four specific measures designed to protect the confidentiality of that Preliminary Report that the City had itself acquiesced in.

81 First, the City did not maintain a separate file to ensure that our Preliminary Report is considered to be in my custody and does not form part of their records. As acknowledged by Mr. Potts in his second April 9, 2009 email to Assistant Commissioner Beamish, this condition was "disregarded" by the City. Indeed, its actions are so far removed from compliance with the condition designed to reflect the recognition that the Preliminary Report remains the property of the Ombudsman that the City now claims that the Preliminary Report is its record.

82 Second, the City did not respect the condition that the Preliminary Report not be marked or copied. Mr. Potts told Assistant Commissioner Beamish that a "few copies were made and circulated to … staff." Although we do not know the exact number, Mr. Potts certainly left Ms. Pettigrew with the impression that the copies were more than a "few." On April 2, 2009, he told her that "normally 11 or 12 copies would be made."

83 Third, in spite of repeated demands, the City has not returned the Preliminary Report, contrary to the stipulation that it was to do so within 30 days of its receipt.

84 The City cannot plead ignorance or mistake to explain these violations. The conditions were clear and patent. Mayor Gray knew of them through his personal conversation with Ms. Pierre of our Office. My covering letter set out the conditions and explained why they were imposed. The document itself was marked "Confidential – Property of the Ombudsman / Not to be Marked or Copied." These breaches were not accidental. The City of Oshawa simply chose to ignore the conditions and our repeated demands for compliance.

The Separate File and Copy Breaches

85 The explanation for the first two breaches was offered by Mr. Potts to Mr. Beamish. He said:

The conditions to maintain a separate file and to not make copies were inconsistent with the purpose for which the draft was delivered to the City. Accordingly, those conditions were disregarded.

86 Those conditions were in no measure impossible. We have never seen them be breached before. Mr. Beamish was closer to the mark when he complained to Ms. Pettigrew that they were "difficult." Inconvenience to the government authority, however, is the cost of protecting confidentiality and balancing competing considerations under the *Ombudsman Act*. At no time did anyone from the City call us to complain that the conditions were unworkable, or to ask for special permission to make a limited number of controlled copies. It decided by fiat that the conditions were meddlesome and it ignored them simply because it did not like them.

The Failure to Return the Preliminary Report and the Copies

87 The failure to return the Preliminary Report and the copies requires more complex evaluation.

88 The genesis for this, the most serious of the breaches, is that Mayor Gray did not like the tone of the Final Report. It is patent from the unfolding of the narrative that after he complained to Ms. Pettigrew about the way he felt the Final Report reflected on him, he spoke to Mr. Potts, who took up the cause. Mr. Potts felt that Mayor Gray might want to use the Preliminary Report to defend the way he responded to it, as described in the Final Report. He felt somehow that the Preliminary Report was necessary to "put everything in context." He suggested to Ms. Pettigrew that "under the circumstances an issue was raised about releasing the preliminary report."

89 I am persuaded that Mr. Potts honestly believes that the requirement to return the Preliminary Report is unreasonable. It is evident from relevant conversations and correspondence that he finds it unfair that the Final Report would describe Mr. Gray's response to the Preliminary Report and yet Mayor Gray would be deprived by our protocol of the ability to reference the document itself to defend himself from any adverse judgments his response, as recorded in the Final Report, might elicit.

90 In response to these concerns, I will say three things:

91 First, the Preliminary Report processes we use will never be perfect. They cannot be. They are an attempt to compromise competing considerations. They are an accommodation between the *Ombudsman Act*'s section 24(3) privilege and my duty of confidentiality in section 12(1), on the one hand, and my duty under section 18(3) to give those against whom adverse reports or recommendations could be made a meaningful right of response, and my more general obligation to base my reports on accurate information, on the other. Yet the fact that the process is imperfect gives no right to disregard it. That protocol has been crafted as one of the legal processes created under section 15(3) of the *Ombudsman Act*. I am authorized to develop those processes, and this Office is entitled as a matter of law to have them respected, not disregarded because of their disapproval by others.

92 Second, whatever Mr. Potts, Mayor Gray or anyone else within the City of Oshawa might think about the way those processes operated in the case at hand, the Mayor and the City had agreed to abide by them. Mayor Gray was told of the conditions under which the Preliminary Report was furnished before it was sent. He raised no objection and indicated he understood. The Preliminary Report was sent under covering letter spelling out the conditions for its delivery. If those conditions were unacceptable, the Preliminary Report should have been returned unread, or the Ombudsman should have been approached to discuss things. It was nothing short of dishonourable for obvious implied undertakings to have been offered at the outset, but ignored out of pique or disapproval at the way things turned out.

93 Third, it is, in truth, difficult to credit the explanations offered for the City's decision to pirate our report. Those explanations take on the character of arguments of convenience, mere instrumental positions grabbed onto as a way of flattering a desired outcome – the wish to maintain control over the Preliminary Report in case it could prove helpful in defending the Mayor from public criticism – rather than integral reasons for not returning it. Three things leave the impression of opportunistic legal game playing.

94 The first is the moving legal foundation for the claim by Mr. Potts that the City of Oshawa is prohibited by law from returning the Preliminary Report. When the demands for the return of the document were first made on March 26, 2009, Mr. Potts suggested, as recorded by Ms. Pettigrew, that "the Information and Privacy Commissioner might take the view that it was a City record under *MFIPPA* (*The Municipal Freedom of Information and Protection of Privacy Act)* and required to be retained." At 4:18 on March 30, 2009, he left a voicemail message with Ms. Pettigrew. He said:

> "[T]he reason I called you in contemplation of the possibility that a third party might compel the City to make a decision in its capacity as "head" under the *Municipal Freedom of Information and Protection of Privacy Act*, which requires us to consider what is a record, and whether we have custody of a record … It may be that the Ombudsman's office can't compel us not to comply with *MFIPPA*.

95 There was no mention of the *Municipal Act, 2001* or the city's records retention bylaw. His concerns were all about *MFIPPA*.

96 An hour or so later, Mr. Potts emailed Ms. Pettigrew. While this email mentioned the City's records retention bylaw, that comment was a sidebar. This was a dedicated message about *MFIPPA* and the how the City's transparency obligation under *MFIPPA*, as well as its obligation to disclose on a *MFIPPA* request, may impact upon the City's legal ability to comply with the Ombudsman.

97 When Mr. Potts spoke to Ms. Pettigrew shortly after the email, it was again all about *MFIPPA*.

98 A few days later, after the Ombudsman non-co-operation investigation was announced, *MFIPPA* again played a central theme in Mr. Potts' attempt to explain why the document could not be returned. In his conversation with Ms. Pettigrew on April 2, it was *MFIPPA* that featured. While Mr. Potts did say that he was "confident in his opinion that as a result of the retention provisions of *MFIPPA* and the City's own Records Retention By-Law, the preliminary report is within the custody and control of the City and cannot be returned as requested," he returned to the *MFIPPA* obligation at the end of the conversation as the explanation; he could not return the Preliminary Report because doing so "would contravene *MFIPPA*."

99 Yet Mr. Potts' position took a dramatic turn when Assistant Commissioner Brian Beamish said, straight up, that "there is nothing in *MFIPPA* that would prevent a municipality from returning the copy of a draft report from the Ombudsman, or that would prevent a municipality from fulfilling the conditions imposed by [the Ombudsman]." Now that the *MFIPPA* bubble had burst, it was time for revisionist history. Mr. Potts went so far as to claim that *MFIPPA* was "not the issue between the parties." He said:

> The City has only engaged the Ombudsman's office in a discussion about *MFIPPA* to the extent that a third party may, at some point, submit an access request… Again, the City's intention throughout has been to comply with all of its obligations including its immediate obligation to

retain the subject record pursuant to the *Municipal Act, 2001* and its Records Retention By-law.

100 Without question, when the *MFIPPA* mare that he had been riding was shot out from under him, Mr. Potts changed horses by jumping on the untenable retention bylaw pony that had been trotting behind in the shadow of *MFIPPA*, and then he denied that the *MFIPPA* mare had been his ride.

101 The second symptom of instrumental reasoning is the exchange that Mr. Potts had with Ms. Pettigrew on April 2 relating to the Ombudsman's confidentiality conditions. When she was debating the City's right to keep the documents with Mr. Potts, he said that we should have confirmed the confidentiality conditions with Mayor Gray before releasing the Preliminary Report. The obvious implication of the comment is that this would have mattered. And of course it should. How can the City claim it has a legal obligation to breach an undertaking made by the Mayor as a condition of receiving someone else's document? When Mr. Potts learned that we had advised the Mayor before the Preliminary Report was sent, he dropped this line like a hot rock and began to argue *MFIPPA* again.

102 The third symptom that the City of Oshawa is scrambling for any legal argument it can find to defend its conduct is the discreditable jurisdictional claims it is making in opposition to our investigation. It seems to be firing every arrow it can pull from its quiver in an effort to avoid acknowledging that it simply breached its obligation to co-operate, but none of those arrows have points.

103 In the end, it does not matter whether the City of Oshawa in general or Mr. Potts in particular are simply making arguments of convenience. They are wrong. The *MFIPPA* arguments have been undercut by the opinion of the Information and Privacy Commissioner. Of course, those arguments never did have merit. It bears note that the records of a municipal ombudsman are statutorily exempt from the *Municipal Freedom of Information and Protection of Privacy Act* by subsection 223.15(3) of the *Municipal Act, 2001*. This is so even though they are *municipal* ombudsmen. This provision exists to ensure that the secrecy provision in subsection 223.15(1) can be protected. The Ombudsman of Ontario does not have a similar express *MFIPPA* exemption for a simple reason: This Office is not subject to *MFIPPA*. Clearly if the Legislature recognizes that documents used by a municipal ombudsman are *MFIPPA*-proof to protect privilege, documents used by the Ombudsman of Ontario are *MFIPPA*-proof to protect privilege. It is futile to argue in the face of this that a municipality is legally obliged to snatch from the provincial Ombudsman and hold, for the purpose of the *Municipal Freedom of Information and Protection of Privacy Act*, confidential *MFIPPA*-proof records that

the Ombudsman has conditionally produced to a municipality in order to serve the Ombudsman's investigation.

104 Given the obvious non-application of *MFIPPA*, Mr. Potts' fallback position – that the document retention provisions of the *Municipal Act, 2001* and the City of Oshawa's own document retention bylaw made under the authority of that Act make the Preliminary Report lent to the City by the Ombudsman a record of the City of Oshawa – is simply unarguable. It is counterintuitive to suggest that the retention provisions of the *Municipal Act, 2001* operate using a different concept of municipal records than *MFIPPA* does. It is apparent that the relevant provisions are meant to work together. The "Records" provisions of the *Municipal Act, 2001* are sections 253 and 254. Section 253(1) says "Subject to the *Municipal Freedom of Information and Protection of Privacy Act*, any person may, at all reasonable times, inspect any records under the control of the clerk." Section 254(1) therefore requires the municipality to "retain and preserve the records of the municipality … in a secure and accessible manner." If records are not records within the meaning of *MFIPPA*, they are not caught by the *Municipal Act, 2001* provisions.

105 Then there is this essential underlying point. The Preliminary Report was never given to the City to make its own. It was lent to the City. It was furnished only after its character as the property of the Ombudsman was made clear. It was delivered conditionally.

106 I am aware, as Mr. Potts claims, that the Preliminary Report was used by the City and its officials and then referenced in documents that are municipal documents, such as the Mayor's response. But none of this can logically change the ownership of the Preliminary Report itself. To accept the position now being advanced by Mr. Potts is to agree that no-one can allow a municipal official to review one of their documents without that document becoming a municipal record, regardless of the conditions that may be attached to its loan, and regardless of the express or implied undertakings that may apply.

107 Because of the conditions attached to its loan – conditions that were agreed to – the Preliminary Report was never "under the control of the clerk." It was held under the control of the conditions imposed on its delivery. The Preliminary Report is in no way a municipal record, and it is a contrived argument to suggest otherwise.

The Failure to Co-operate in the Misconduct Investigation

108 The City of Oshawa has not directed its personnel to participate in interviews during this investigation. Quite the contrary. It is saying we do not have jurisdiction. Nor has it responded to Mr. Jones' demand for documents. It is evident that it has not co-operated in this misconduct investigation. It is using half-baked jurisdictional claims to avoid doing so. Those claims cannot be credited on their own merits, and they are discredited by the history of shifting legal positions offered in opposition to Oshawa's obligation to return the Preliminary Report.

Why This Matters

109 Two things make this sad story particularly offensive. The first is that my Office depends entirely upon moral suasion and co-operation to function. The citizens of this province receive tremendous value from the work that we do. We are efficient, inexpensive, and effective at solving real problems. It is disheartening to encounter such rank disrespect for this Office. Had I chosen to ignore it, it could have become contagious. I have therefore chosen to expose it to the sanitizing light of day in the hope and expectation that this Office will not again experience such intransigence.

110 The second thing that makes this episode deeply troubling is that the City of Oshawa did not have to accept my authority to investigate its closed meeting complaints. It chose to do so. It elected to attorn to my jurisdiction by deciding not to appoint its own internal investigator. When a municipality elects to use my Office's services, it should have the professionalism to respect my processes. It should not try to take the contributions of my Office on its own terms. If it wants to control the processes of its closed meeting investigations, it should take advantage of the opportunity that the *Municipal Act, 2001* provides to do so, rather than discredit and disrespect my Office. If it wants a toothless closed meeting investigator, it should design and appoint an investigator who fits its liking. If it calls on the Ontario Ombudsman, it should recognize the entire package.

Opinion

111 The City of Oshawa has failed to co-operate in connection with the investigation into the Corporation of the City of Oshawa to abide by the conditions under which a copy of my Preliminary Report concerning the Development Services Committee

Special Meeting of May 22, 2008 was provided to the City. It did so by disregarding conditions it had agreed to, to keep the Preliminary Report in its own file. It did so by disregarding the prohibition on making and circulating copies. And it continues to do so by refusing to return the Preliminary Report and the copies it made. This conduct is contrary to law, unreasonable and wrong.

112 The City of Oshawa has failed to co-operate in the investigation into whether the Corporation of the City of Oshawa failed to abide by the conditions under which a copy of my Preliminary Report concerning the Development Services Committee Special Meeting of May 22, 2008 was provided to the City. It did so by refusing to make city officials available for interview, and by not providing documents that we have demanded. This conduct is contrary to law, unreasonable and wrong.

113 Accordingly, I make the following recommendation and formal observation:

Recommendation

114 The City of Oshawa should return the Preliminary Report relating to the Investigation into the City of Oshawa Development Services Committee Special Meeting of May 22, 2008, and all copies made.

Formal Observation

115 Municipalities attorning to the jurisdiction of the Ombudsman of Ontario should understand that by inviting the Ombudsman of Ontario to conduct their closed meeting investigations, they are attorning to all of the lawful powers, procedures and processes used by the Ombudsman of Ontario, and they should respect those lawful powers, procedures and processes by demonstrating compliance.

André Marin
Ombudsman of Ontario

Response from City of Oshawa, April 24, 2009

OSHAWA
ONTARIO, CANADA

RECEIVED
OMBUDSMAN ONTARIO
APR 24 2009
MAILROOM

OFFICE OF THE MAYOR
CITY OF OSHAWA
50 CENTRE STREET SOUTH
OSHAWA, ONTARIO
L1H 3Z7

TELEPHONE (905) 436-5600
FAX (905) 436-3884
EMAIL: jgray@oshawa.ca

MAYOR JOHN GRAY

April 24, 2009

André Marin, Ombudsman (by facsimile transmission)
Bell Trinity Square
483 Bay St., 10th Floor, South Tower
Toronto, ON M5G 2C9

Dear Sir:

Re: New Investigation – Retention of Preliminary Report re Development Services Committee Closed Education Session of May 22, 2008

Thank you for your letter received yesterday afternoon. It is not feasible to personally attend at your Toronto office, view and provide comments on the document referenced in your letter by 5:00 pm this afternoon. If you wish the City to review a document, please convey it at your convenience and we will respond at the earliest opportunity.

The following documents are attached to this letter:
1. Apr 23/09 letter: Marin/Gray
2. Apr 14/09 e-mail: Potts/Pettigrew
3. Apr 9/09 e-mail: Potts/Beamish (cc Pettigrew)
4. Apr 2/09 e-mail: Potts/Pettigrew
5. Apr 1/09 e-mail: Potts/Pettigrew
6. Mar 31/09 e-mail: Marin/Gray

With respect, the Ombudsman is without jurisdiction to have continued or to have commenced an investigation respecting the City's obligation to retain the Ombudsman's preliminary report concerning the Development Services Committee's Closed Education Session of May 22, 2008 ("Preliminary Report"). The reasons are summarized in Attachment 2 under the heading, "2. Jurisdiction".

The City is obliged to retain the Preliminary Report pursuant to the *Municipal Act, 2001* and the City's records retention by-law. The reasons are summarized in Attachment 2 under the heading, "1. Records Retention", and expressed elsewhere in the attachments.

The City has no objection in the event that the Ombudsman chooses to publish the Preliminary Report. Rather, its publication will assist readers to better understand the comments in my letter dated Feb 17/09 respecting the Preliminary Report.

If the Ombudsman's office is determined to proceed with the publication of a fresh report without having had questions of jurisdiction resolved by the Divisional Court, I respectfully request that this letter and its attachments also be published to ensure that our communications are transparent and are accurately represented.

Respectfully,

John Gray
Mayor

cc: City Manager
cc: City Clerk
cc: City Solicitor

Attachment #1

Ombudsman
ONTARIO

André Marin
OMBUDSMAN

RECEIVED
APR 23 2009
OFFICE OF THE MAYOR

23 April 2009

His Worship Mayor John Gray
The Corporation of the City of Oshawa
50 Centre Street South
Oshawa, ON
L1H 3Z7

Dear Mayor Gray:

I have concluded my investigation into the apparent failure of the Corporation of the City of Oshawa to abide by the conditions under which a copy of my Preliminary Report on the Development Services Committee Closed Education Session of May 22, 2008, was provided to you.

My preliminary report prepared with respect to this investigation, may be viewed at my Offices, provided that a formal written undertaking is signed confirming agreement with the conditions under which review of the preliminary report is permitted. Reasonable alternative arrangements for viewing the document will also be considered.

The City has until 5:00 p.m. Friday, April 24, 2009, to make representations to me regarding my preliminary report.

Please contact Ms. Laura Pettigrew, Senior Counsel, at 416-586-3325, to make arrangements for viewing the preliminary report.

Yours truly,

André Marin
Ombudsman

COPY:
CITY MANAGER
CITY CLERK
CITY SOLICITOR
23/4/09.

Bell Trinity Square
483 Bay Street, 10th Floor, South Tower, Toronto, ON M5G 2C9
483, rue Bay, 10e étage, Tour sud, Toronto (Ontario) M5G 2C9
Tel/Tél : 416-586-3347
Fax/Téléc : 416-586-3506 TTY/ATS : 1-866-411-4211
www.ombudsman.on.ca

Attachment #2

From: David Potts
Sent: Tuesday, April 14, 2009 11:24 AM
To: 'Laura Pettigrew'
Subject: New Investigation re Ombudsman's Draft Report

Ms. Pettigrew:

Thank you for your e-mail.

1. Records Retention

The City's good faith efforts to assist the Ombudsman's staff's understanding of municipal records retention obligations have been unhelpful. Specifically, as most recently evidenced by Ms. Finlay's letter to IPC, the Ombudsman's staff continue to confuse a municipality's obligations in response to an MFIPPA access request with a municipality's obligations to retain records pursuant to the *Municipal Act, 2001* and a municipality's records retention by-law. The City has not, as claimed in your e-mail below, "cited its legal obligation to retain documents under MFIPPA". Rather, in respect of its obligation to retain records, the City has consistently cited the *Municipal Act, 2001* and its records retention by-law. Without limitation, please refer to the writer's e-mails of March 30, April 1, April 2 and April 9.

I understand that Assistant Commissioner Beamish is prepared to request IPC legal counsel to assist the Ombudsman's staff. It is, however, clear that the Ombudsman's staff are disinclined to seek that assistance.

2. Jurisdiction

The Ombudsman is without jurisdiction to continue or to commence an investigation respecting the City's obligation to retain the Ombudsman's draft report. Specifically, the Ombudsman's investigation respecting Oshawa Development Services Committee's closed education session of May 22 was concluded by the Ombudsman's delivery of his final report on March 24. Further, there is no "person or body of persons in his, her or its personal capacity" that has been affected by the City's retention of the draft report pursuant to the *Municipal Act, 2001* and its records retention by-law.

Further, the Ombudsman has advised that the investigation relates to an offence under s. 27 of the *Ombudsman Act. The purpose of any such investigation is inconsistent with the protections afforded by subsection 19(6) of that Act.*

As suggested on April 2, questions respecting the Ombudsman's jurisdiction should be referred to the Divisional Court. Only the Ombudsman has standing to initiate that proceeding. The City will fully cooperate including the writer's acceptance of service of any originating process.

3. Publication of Final Report

It is anticipated that the Ombudsman's final report will be made public by transmittal to an open session of Oshawa Council and, perhaps, by publication on the City's website along with the Mayor's letter dated February 17 redacted to the extent of the individuals' names in the penultimate paragraph on page 2 of that letter. This is likely to occur after April 27 which is the next regularly scheduled Oshawa Council meeting.

Any inquiries or communications respecting the City's rights or obligations should be referred to the writer.

Regards

David J. Potts, City Solicitor,
The Corporation of the City of Oshawa
t (905) 436 3854
f (905) 436 5689
www.oshawa.ca

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-----Original Message-----
From: Laura Pettigrew [mailto:lpettigrew@ombudsman.on.ca]
Sent: Monday, April 13, 2009 9:39 AM
To: David Potts
Subject: Oshawa Development Services Committee Closed Education Session of May 22, 2008

Dear Mr. Potts:

I wish to clarify for you in light of your emails to Mr. Beamish that we do not feel it is necessary to engage in a tele-conference with Mr. Beamish or IPC legal staff. As you will see from Ms. Finlay's letter and the IPC's opinion, the Ombudsman as an Officer of the Legislature, requested that the Commissioner provide him with an opinion on whether there is any requirement under MFIPPA for municipalities to retain a copy of a draft report forwarded to them by the Ombudsman as part of his investigative process. A copy of the IPC's opinion in response to that request was provided to you.

As Ms. Finlay noted in her letter, the City of Oshawa clearly cited its legal obligation to retain documents under MFIPPA in response to the Ombudsman Office's attempts to recover the Ombudsman's preliminary report and any unauthorized copies that the City may have made. This report was provided to the City pursuant to specific direction from the Ombudsman on February 2, 2009, including that the report be returned.

The Ombudsman's Office is not seeking the IPC to mediate the return of the Ombudsman's preliminary report and it is our view that it would be inappropriate to do so. The report was provided to the City pursuant to specific direction by the Ombudsman. The City's continued refusal to abide by the Ombudsman's direction has the potential to impair the integrity of our investigative process, which is not negotiable.

We cannot accept your additional claims that the Municipal Act, 2001 or Oshawa's Records Retention by-law prevent the City of Oshawa from complying with the Ombudsman's direction.

Our Office has attempted to be reasonable in its discussion of your concerns. You have however continued to refuse to accept that your client is bound by the Ombudsman's direction, which was clearly explained to the Mayor and set out in writing when the City was provided with the Ombudsman's preliminary report. As Oshawa has not returned the Ombudsman's preliminary report and all copies of it made by the City, we have no choice but to resume our investigation. Our

investigators will be in contact with City officials to begin their interviews and we expect their full cooperation.

Yours truly,

Laura Pettigrew
Senior Counsel

Attachment #3

From: David Potts
Sent: Thursday, April 09, 2009 2:44 PM
To: 'brian.beamish@ipc.on.ca'
Cc: 'Laura Pettigrew'
Subject: RE: Ombudsman Investigation re draft report re closed meetings investigation

Attachments: AR-M355N_20090403_133133-2-1.pdf; Ombusman ltr.pdf

Mr. Beamish:

I've now been provided with Ms. Finlay's letter dated April 3, 2009.

AR-M355N_200904
03_133133-2-1.p...

We note that Ms. Finlay's inquiry was, in fact, scoped to "whether there is any requirement under the *Municipal Freedom of Information and Privacy Act* for municipalities to retain a copy of a draft report forwarded to them by the Ombudsman as part of his investigative process". Your letter responds to that question. However, as noted below, that does not appear to be the issue between the parties.

In determining that the preliminary report is a record that is subject to retention obligations imposed by the *Municipal Act, 2001* and the City's Records Retention By-law, consideration has been given to relevant matters including:

1. On Feb 2/09, the Ombudsman delivered a preliminary draft report to the City for the purpose of providing comments to be considered by the Ombudsman before issuing his final report.

2. A few copies of the report were made and circulated to those City staff or Councilors whose input was relevant to the Ombudsman's request for comments. The conditions to maintain in a separate file and to not make copies were inconsistent with the purpose for which the draft was delivered to the City. Accordingly, these conditions were disregarded.

3. By letter dated Feb 17/09, the City responded to the Ombudsman's request for comments. The City's comments were prepared on the basis of the copies of the draft report and internal discussions respecting its contents. The City files of those participating in this process (including the writer) are meaningless without the draft report to which the comments respond.

4. The final report was amended to respond to certain of the City's comments.

5. The City's comments are referenced in the final report as "Response of the Council of the City of Oshawa".

6. The Ombudsman Office has advised that the City's response to the draft report may be released and that the City may "speak to the Ombudsman's investigation".

The City has only engaged the Ombudsman's office in a discussion about MFIPPA to the extent that a third party may, at some point, submit an access request. For example, the City has inquired of the Ombudsman's office as to whether it considers itself an agency of the Government of Ontario for the purpose of the government relations exemption prescribed by paragraph 9(1)(d).

Again, the City's intention throughout has been to comply with all of its obligations including its immediate obligation to retain the subject record pursuant to the Municipal Act, 2001 and its Records Retention By-law.

In the circumstances, we will proceed on the assumption that your response to Ms. Finlay was not intended to suggest that the City is compelled to return all copies of the draft report and that your response was not intended to address the City's obligations pursuant to the *Municipal Act, 2001* or its Records Retention By-law.

We remain willing to engage counsel for the Ombudsman in a joint discussion with IPC counsel if the Ombudsman's office determines that it may be helpful to do so including on an off-record, confidential basis. If so, IPC's contribution to that discussion will be helpful and appreciated.

Regards

David J. Potts, City Solicitor,
The Corporation of the City of Oshawa
t (905) 436 3854
f (905) 436 5689
www.oshawa.ca

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From: David Potts
Sent: Thursday, April 09, 2009 1:03 PM
To: 'brian.beamish@ipc.on.ca'
Cc: 'Laura Pettigrew'
Subject: Ombudsman Investigation re draft report re closed meetings investigation

Mr. Beamish:
Further to my voicemail, attached is a letter dated Apr 9/09 from Barbara Finlay to which is attached your letter of same date to Ms. Finlay.

Ombusman ltr.pdf
(129 KB)

It was the City's suggestion to involve IPC and the writer's expectation that we would jointly engage our IPC colleagues in a discussion respecting the matter. However, we've not been given the opportunity to participate in any communications between the Ombudsman's Office and IPC. Accordingly, I've e-mailed Ms. Pettigrew requesting a copy of the letter dated Apr 3/09 (and any attachments to it) referenced in your letter so that I may better understand how the issue has been presented to IPC and so that I may properly advise Oshawa.

In the interim, we note that the opinion in the penultimate paragraph of your letter is scoped to MFIPPA requirements respecting retention. However, discussions respecting MFIPPA have only arisen in relation to the potential applicability of paragraph 9(1)(d) in the event of an access request. MFIPPA has not been cited as an impediment to returning all copies of the draft report. It's unclear whether your office has been requested to consider the City's records retention obligations arising under the Municipal Act, 2001 or the City's Records Retention By-law. However, it is clear that the Ombudsman's Office is interpreting your opinion as compelling the City to return all copies of the preliminary report without retaining copies under threat of a fresh investigation.

In the circumstances, I would greatly appreciate if you'd contact me at your very earliest convenience. Preferably, your legal staff, Ms. Pettigrew and I will engage in one conversation, perhaps by telephone conference.

Regards

David J. Potts, City Solicitor,
The Corporation of the City of Oshawa
t (905) 436 3854
f (905) 436 5689
www.oshawa.ca

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Attachment #4

From: David Potts
Sent: Thursday, April 02, 2009 7:54 PM
To: 'Laura Pettigrew'
Subject: New investigation re Ombudsman's preliminary report

Ms. Pettigrew:

Thank you for calling me in response to my voicemail. I called after being advised that investigators from the Ombudsman's office were planning to attend at the City's offices tomorrow to interview individual members of staff in relation to the new investigation referenced in the Ombudsman's Mar 31/09 letter. When I was unable to reach you, I contacted the two investigators and requested that they put you in touch with me.

I was pleased for the opportunity to discuss these issues directly with you as a continuation of the City's good faith efforts to comply with all of its legal obligations. The following comments are limited to what appears to be the key, preliminary issue. They're provided in good faith, "on record" and intended to encourage a resolution which may also resolve the remaining issues set out in my e-mail of Apr 1/09.

1. As noted in earlier communications, it is the City's view that the Ombudsman's preliminary report is a record in the City's custody or control. A copy of it was delivered by the Ombudsman to the City for the purpose of preparing a response. The Ombudsman subsequently received, apparently considered and ultimately referenced the City's response in his final report. Clearly, it was intended that the City act on the preliminary report and it did so pursuant to the Ombudsman's request after receiving from the Ombudsman the preliminary report.

2. The City is obliged to retain records in its custody or control. The Ombudsman's direction to return it (and any copies) is contrary to the City's obligations respecting records in its custody or control.

3. Whether the preliminary report is a record in the City's control or power is related to the Ombudsman's jurisdiction to investigate. This issue should, therefore, be settled or determined without delay.

4. If you and I are unable to resolve this preliminary legal issue, I've suggested that we invite our legal colleagues in the Office of the Information and Privacy Commissioner/Ontario (or other mutually acceptable access/privacy experts) to consult with us.

5. If the issue remains unresolved, it should be referred to the Divisional Court pursuant to subsection 14(5) of the Act (along with any remaining unresolved and relevant issues respecting jurisdiction including those identified in the writer's e-mail dated Apr 1/09 and in your e-mail below).

6. *The Ombudsman's investigators should be immediately requested to "stand down" pending the resolution of this issue.* I appreciate your undertaking to respond to this request at the earliest opportunity and I look forward to your confirmation.

7. The Ombudsman may be reassured that the City is treating the preliminary report as a record exempt from disclosure pursuant to paragraph 9(1)(d) of the Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA") and will continue to do so unless and until the issue is determined differently by the Information and Privacy Commissioner/Ontario in the context of a complaint or until the City reaches a different legal conclusion (with reasonable notice to the Ombudsman).

8. On the assumption that we *may* agree that the preliminary report is, in the circumstances, a record in the City's custody or control, we should presently turn our minds to the applicability

of paragraph 9(1)(d) of MFIPPA so that we'll be in a position to respond if/when a request for records is submitted. For that purpose, I'd appreciate if you'd respond to question 8 in the Apr 1/09 e-mail.

The City is in good faith attempting to comply with all of its legal obligations including those related to records in its custody or control. In fact, the Ombudsman's letter dated Mar 24/09 expresses appreciation for the City's cooperation shown during the course of the Ombudsman's recent closed meeting investigation. We are, of course, hopeful that the Ombudsman's office will reciprocate.

Regards

David J. Potts, City Solicitor,
The Corporation of the City of Oshawa
t (905) 436 3854
f (905) 436 5689
www.oshawa.ca

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-----Original Message-----
From: Laura Pettigrew [mailto:lpettigrew@Ombudsman.on.ca]
Sent: Thursday, April 02, 2009 5:37 PM
To: David Potts
Subject: Oshawa Development Services Committee Closed Education Session of May 22, 2008

Hi Mr. Potts,

I received your message, and Ciaran Buggle and Mary Jane Fenton also contacted me indicating that you had called them.

With respect to your question regarding the Ombudsman's authority to undertake the current investigation, while the substance of the investigation into the closed meeting complaints has concluded, the Ombudsman's process has not concluded, as the City's compliance with the conditions for dealing with the preliminary report is still outstanding.

Unlike other statutory decision makers, the Ombudsman has also been considered to have equitable jurisdiction allowing him to reopen an investigation. Our office maintains that it has authority to investigate whether a breach of the Ombudsman's procedural conditions has occurred.

Laura Pettigrew
Senior Counsel

Attachment #5

From: David Potts
Sent: Wednesday, April 01, 2009 12:26 PM
To: 'info@ombudsman.on.ca'
Subject: FW: Oshawa Development Services Committee Closed Education Session of May 22/08

Attachments: Marin ltr.pdf; Jones ltr.pdf; Ombudsman ltr.pdf
Laura Pettigrew
Senior Counsel, Office of the Ombudsman

Ms. Pettigrew:
I'm back in the office today and following up with respect to our recent communications. In the interim, the Ombudsman has written advising of his intention to undertake a further investigation and expressing his view that an offence may have been committed contrary to s. 27 of the Act. His letter and a letter from Gareth Jones, Director, Special Ombudsman Response Team dated Mar 31/09 are attached.

Marin ltr.pdf (46 KB)

Jones ltr.pdf (72 KB)

The letters raise new and important questions. So that I may properly advise council and staff, I'd appreciate clarification with respect to the following issues:

1. Was the Ombudsman's investigation respecting Oshawa Development Services Committee Closed Education Session of May 22 concluded by his delivery (and pending publication) of his final report attached to his transmittal letter dated Mar 24/09?

2. If the answer to question 1 is, "yes", *what is the Ombudsman's authority for initiating the investigation referenced in the two letters dated Mar 31/09 (attached)*?

3. If the answer to question 2 is s.14 of the Act, who is the "person or body of persons in his, her or its *personal capacity*" alleged to have been affected by the municipality's act or omission?

4. Does the Ombudsman intend to rely on information and records obtained during the course of his new investigation for the purpose of prosecuting the offence to which the Ombudsman's Mar 31/09 letter refers?

5. Paragraph 27(b) of the Act creates an offence for every "person who, [...] without lawful justification or excuse, refuses or wilfully fails to comply with any lawful requirement of the Ombudsman or any other person under this Act." Is this the alleged offence to which the Ombudsman's Mar 31/09 letter refers?

6. If the answer to 5 is, "yes", what is the "lawful requirement" under the Act with which it is alleged the City has failed to comply?

7. Is it the Ombudsman's position that the preliminary report attached to his transmittal dated Feb 2/09 is *not* a "record" in the municipality's "custody or control" for the purposes of section 4 of the Municipal Freedom of Information and Protection of Privacy Act ("MFIPPA")?

8. Is it the Ombudsman's position that his office is an agency of the Government of Ontario?

This and the e-mail below are good faith attempts to better understand the Ombudsman's position respecting the City's obligations including under MFIPPA. For example, if the Ombudsman's preliminary report is a "record" in the City's "custody or control", it may,

nevertheless, be exempt from disclosure pursuant to MFIPPA 9(1)(d) if the answer to question 8 is "yes". Accordingly, it seems that your timely consideration and response to these questions and to the e-mail below is warranted prior to any determination to proceed with a fresh investigation. Your response will also be appreciated so that I may properly advise Oshawa council and staff.

Regards

David J. Potts, City Solicitor,
The Corporation of the City of Oshawa
t (905) 436 3854
f (905) 436 5689
www.oshawa.ca

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From: David Potts
Sent: Monday, March 30, 2009 5:01 PM
To: 'laura.pettigrew@ontario.ca'; 'info@ombudsman.on.ca'
Cc: Sandra Kranc
Subject: Oshawa Development Services Committee Closed Education Session of May 22/08

Ms. Pettigrew:
Thank you for your letter which follows our recent conversation respecting the Ombudsman's final report.

Ombudsman ltr.pdf
(162 KB)

As discussed, I contacted you in contemplation of a potential question respecting the City's obligations, if any, to disclose the Ombudsman's preliminary report if/when a request for records may be submitted by a third party pursuant to the Municipal Freedom of Information and Protection of Privacy Act (Ontario) (MFIPPA). The final report refers to the Mayor's comments which, in turn, refer to the preliminary draft so it's plausible that a request will be forthcoming and that the municipality will be required to determine its MFIPPA obligations as they may or may not apply to the preliminary report. The City must, therefore, first determine whether the preliminary report is a "record" to which MFIPPA and the City's records retention by-law apply. That determination may impact on the City's legal ability to comply with the Ombudsman's request where, as noted in your letter, the preliminary report was provided to the City by the Ombudsman's office. Your letter's reference to the principles of openness and transparency reflect the concern that a correct answer is also important with respect to the City's transparency obligations under MFIPPA.

As mentioned in my voicemail of this afternoon, I'm in the Court of Appeal tomorrow and Wednesday. I've copied City Clerk Services which has statutory and other delegated responsibilities in respect of the City's records so that we'll be in a position to discuss the request in a timely fashion. In the interim, if you've any authorities that support one view or another, I'd be pleased to consider them for the purpose of giving an opinion to staff.

Regards

David J. Potts, City Solicitor,
The Corporation of the City of Oshawa

t (905) 436 3854
f (905) 436 5689
www.oshawa.ca

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Attachment #6

Ombudsman
ONTARIO

André Marin
OMBUDSMAN

CITY: CLERKS
LEGAL
CITY MANAGER

March 31, 2009

His Worship Mayor John Gray
The Corporation of the City of Oshawa
50 Centre Street South
Oshawa, ON
L1H 3Z7

By fax and letter

Dear Mayor Gray:

I am writing to advise you of my intention to investigate the apparent failure of the Corporation of the City of Oshawa to abide by the conditions under which a copy of my Preliminary Report into the Development Services Committee Closed Education Session of May 22, 2008 was provided to you. This report was sent to you on February 2nd, 2009. Such conduct may constitute an offence under s 27 of the Ombudsman Act.

The investigation will be conducted by the Special Ombudsman Response Team. The lead investigator, Ciaran Buggle will be in contact with your office today to arrange interviews with yourself and other potential witnesses.

A letter requesting documents will be sent to you shortly.

Yours truly,

André Marin
Ombudsman

Bell Trinity Square
483 Bay Street, 10th Floor, South Tower, Toronto, ON M5G 2C9
483, rue Bay, 10e étage, Tour sud, Toronto (Ontario) M5G 2C9
Tel./Tél. 416-586-3347
Facsimile/Télécopieur : 416-586-3506 ATS/ATS : 1-866-411-4211

www.ombudsman.on.ca